SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 495

G. E. BURFORD, ET AL.,

Petitioners,

vs.

SUN OIL COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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To the Honorable Supreme Court of the United States:

G. E. Burford, X. Y. Z. Oil & Gas Company, the Railroad Commission of Texas, and Ernest O. Thompson, Olin Culberson, and Beauford H. Jester, members of the Railroad Commission of Texas, pray that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit entered in the above case on July 11, 1942, granting a second petition for rehearing by the appellants, Sun Oil Company, et al., and setting aside a prior judgment of said court entered on December 29, 1941, and reversing the judgment of the District Court of the United

States for the Western District of Texas. These petitioners' petition for rehearing was denied by said Circuit Court of Appeals on August 13, 1942.

Opinions Below.

No formal opinion was written by the District Court, but findings of fact and conclusions of law were filed (R. 88-92). Three opinions have been written by the Circuit Court of Appeals. On December 29, 1941, the Court wrote a unanimous opinion affirming the judgment of the District Court, which opinion is reported in 124 F. (2d) 467. The first petition for rehearing filed by the appellants, Sun Oil Company, et al., was overruled without opinion on February 2, 1942 (R. 421). The appellants, Sun Oil Company, et al., filed a second petition for rehearing on June 1, 1942, (R. 421) and on July 11, 1942, the Court wrote an opinion granting the second petition for rehearing, setting aside its former judgment, and reversing the judgment of the District Court (R. 429). Judge McCord wrote a special concurring opinion (R. 440). These opinions are reported in 130 F. (2d) 10, 18. On August 12, 1942, the Court wrote an opinion denying the motion of Republic National Bank of Dallas for leave to file a petition in intervention in the nature of a petition for rehearing (R. 474). Judge McCord dissented from this opinion (R. 476). These opinions are reported in 130 F. (2d) 18, 19.

Jurisdiction.

The judgment to be reviewed was entered on July 11, 1942 (R. 440), and these petitioners' petition for rehearing was denied on August 13, 1942 (R. 477). The jurisdiction of this court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C., Title 28, Sec. 347).

Questions Presented.

1. Whether the Circuit Court of Appeals had jurisdiction to grant the second petition for rehearing filed by the appellants, Sun Oil Company, et al., on June 1, 1942, to set aside the judgment theretofore entered by the Court on December 29, 1941, since said second petition for rehearing was filed more than three months after the said appellants' first petition for rehearing was denied, more than three months after the mandate had issued, and nearly one month after the expiration of the period fixed by statute for applying to the Supreme Court of the United States for a writ of certiorari.

2. If the Circuit Court of Appeals had jurisdiction to entertain the second petition for rehearing filed by Sun Oil Company, et al., on June 1, 1942, whether the Circuit Court of Appeals abused its discretion in granting said petition, and in setting aside its former judgment entered December 29, 1941, since said second petition for rehearing presented no new issues of fact or law and since said appellants, Sun Oil Company, et al., had not shown the proper diligence in that they had failed to exercise their right to petition the Supreme Court of the United States for a writ of certiorari.

3. Whether the Circuit Court of Appeals erred in holding that the United States District Court, in determining the validity under the Texas law of an order of the Railroad Commission of Texas granting a permit to drill four oil wells, must exercise an "independent judgment" in determining whether there existed facts that warranted the conclusion that the order was proper and necessary to prevent the waste of public resources or confiscation of private property.

4. Whether the Circuit Court of Appeals erred in reversing the judgment of the District Court and in remanding the case for a new trial, since the District Court upon original and sufficient evidence decided all issues of fact and of State law in favor of the validity of the Railroad Commission's order.

The Facts.

This suit was brought by Sun Oil Company, a New Jersey corporation, against G. E. Burford and the Railroad Commission of Texas and its members, and X.Y.Z. Oil & Gas Company, an Oklahoma corporation, to set aside and nullify an order entered by the Railroad Commission permitting Burford to drill four oil wells upon his 2.33 acre lease in the East Texas Oil Field and to enjoin the drilling and production of oil from such wells. In the alternative, it was prayed that production from these wells be enjoined until the Railroad Commission should restrict the production from such wells to an amount in proportion to the acreage of said lease (R. 29). Jurisdiction was alleged by reason of diversity of citizenship and also because of plaintiff's claim that the Railroad Commission's order violated its property rights under the 14th Amendment to the Constitution of the United States. Magnolia Petroleum Company, a Texas corporation, was permitted to intervene as a plaintiff alleging that the Railroad Commission's order violated its property rights under the 14th Amendment. Both the plaintiff and the intervener attacked the validity of the Railroad Commission's order under the state law, under the provisions of Article 6049c, sec. 8, Vernon's Annotated Texas Civil Statutes,* as well as under the Federal Constitution.

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* This statute reads as follows:

"Any interested person affected by the conservation laws of this State relating to crude petroleum oil or natural gas, and the waste thereof,

The case was tried by the District Judge without a jury. The evidence included the transcripts of the testimony taken at the three hearings before the Railroad Commission (R. 233-343) and also original evidence relating to the reasonableness of the Railroad Commission's order (R. 343-399).

The evidence showed that the permittee, G. E. Burford, was the owner of an oil and gas lease on a narrow strip of land containing 2.33 acres in the East Texas Oil Field. Prior to the granting of the permit under attack, no wells had been drilled on Burford's lease. Sun Oil Company owns a 50 acre lease immediately West of Burford's tract, on which it has drilled seven wells, and Magnolia Petroleum Company owns a 50 acre lease immediately East of Burford's tract, on which it has drilled five wells. The wells drilled by Sun Oil Company and Magnolia Petroleum Company, prior to the Railroad Commission's hearing in 1938, had already produced about 5,000 barrels of oil per acre, or about 250,000 barrels from each lease (R. 347). Because of the location of these leases in the extreme Eastern portion of the East Texas Oil Field, all of this oil had been replaced by oil migrating from other leases (R. 347). These wells on the Sun and Magnolia leases have drained and are still draining oil from Burford's lease (R. 243-245) as well as from other surrounding tracts. Without the wells granted by the Railroad Commission, Burford would

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including this Act, or by any rule, regulation or order made or promulgated by the Commission thereunder, and who may be dissatisfied therewith, shall have the right to file a suit in a Court of competent jurisdiction in Travis County, Texas, and not elsewhere, against the Commission, or the members thereof, as defendants, to test the validity of said laws, rules, regulations or orders. Such suit shall be advanced for trial and be determined as expeditiously as possible and no postponement thereof or continuance shall be granted except for reasons deemed imperative by the Court. In all such trials, the burden of proof shall be upon the party complaining of such laws, rule, regulation or order; and such laws, rule, regulation or order so complained of shall be deemed prima facie valid."

have no opportuntiy to recover the oil under his tract or its equivalent. Of the four wells drilled by Burford on his lease, one was a dry hole and another was a pumper which had not produced (R. 391).

At the conclusion of the evidence, the District Court entered judgment for the defendants, after announcing his opinion "that the issues of law and fact are with the defendants" (R. 87). The District Court also entered findings of fact and conclusions of law in which, after finding the facts in favor of the defendants, he concluded (1) "that the challenged order of the Railroad Commission of Texas does not violate any of the rights of the plaintiff or the intervener under the 14th Amendment to the Constitution of the United States" (R. 90), and (2) "that the various matters of state law raised present no federal question and furthermore present no matters of such merit as to warrant the issuance of an injunction" (R. 91).

Upon appeal to the United States Circuit Court of Appeals for the Fifth Circuit that court (Judges Holmes, McCord, and Dawkins) on December 29, 1941, affirmed the judgment of the District Court. The unanimous opinion (124 F. (2d) 467) held (1) that the effect of the decisions of this Court in the two cases entitled *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, and 311 U. S. 570, was to relegate the parties to the state courts for decision of all questions of state law and, therefore, that these questions should not be decided by the federal courts and (2) that the record did not show "conditions amounting to a denial of Due Process or other violation of the Federal Constitution" (124 F. (2d) at p. 470).

A first petition for rehearing was filed by the appellants, Sun Oil Company, et al., on January 19, 1942 (R. 415). This first petition for rehearing was denied without opinion on February 2, 1942 (R. 421). No request for a stay of mandate was filed and on February 17, 1942, the mandate

was issued (R. 429). No attempt was made by the appellants, Sun Oil Company and Magnolia Petroleum Company, to take the case to the Supreme Court of the United States by certiorari or otherwise.

Nearly four months after the first petition for rehearing was denied and more than three months after the mandate was issued, Sun Oil Company and Magnolia Petroleum Company, on June 1, 1942, filed a second petition for rehearing (R. 421). This second petition for rehearing raised no new questions of law or fact, merely adopting the arguments therefore presented to the court in the first petition for rehearing, and asserting that the court's decision in this case was in conflict with its later decision in *Selby Oil & Gas Co.* v. *Railroad Commission*, 128 F. (2d) 334, decided May 13, 1942 (Judges Hutcheson and Foster; Judge McCord dissenting).

Over the objections of the appellees that the second petition for rehearing was filed too late and was without merit (R. 423), the Circuit Court of Appeals on July 6, 1942, entered its order recalling its mandate and permitting the second petition for rehearing to be filed (R. 429). Thereafter, on July 11, 1942, the court set aside its former judgment, reversed the judgment of the District Court and remanded the case to the District Court for a new trial (R. 440). While not agreeing with the conclusion expressed in the majority opinion by Judge Hutcheson in the case of *Selby Oil & Gas Co.* v. *Railroad Commission*, 128 F. (2d) 334, the court (with Judge McCord specially concurring) nevertheless held that its former judgment should be set aside, because, since the rendition of said judgment, the Supreme Court of Texas on March 11, 1942, had held in the case of *Railroad Commission* v. *Shell Oil Co.*, 161 S. W. (2d) 1022, that under the Texas statutes, the review of the Railroad Commission's order is strictly *de novo* and that in reviewing the reasonableness of the

Railroad Commission's order, the court should exercise its "independent judgment."

Disregarding the fact that the District Court had already passed on all questions of fact and of state law, upon original evidence, in favor of the validity of the Railroad Commission's order, and without discussing the sufficiency of the evidence to sustain the District Court's finding, the Circuit Court remanded the case for a new trial, in order that the District Court might, in its "independent judgment", determine "whether at the time of promulgation there existed facts that warranted fair and reasonable minds in arriving at the conclusion that the order was proper and necessary to prevent the waste of public resources or confiscation of private property" (130 F. (2d) at pp. 17, 18).

A first petition for rehearing was filed by appellees (petitioners here) and was denied by the court without opinion on August 13, 1942 (R. 477). A motion for leave to file a petition in intervention in the nature of a petition for rehearing was presented by Republic National Bank of Dallas, which had loaned $30,000.00 upon an oil payment in reliance upon the first judgment of the court (R. 447). This motion was denied on August 12, 1942 (R. 477). The opinion of the court (R. 474) was written by Judge Holmes (130 F. (2d) at p. 18). Judge McCord dissented upon the ground that "the Appellants' Second Petition for Rehearing came too late and should not have been granted" (R. 476, 130 F. (2d) at p. 19).

Specification of Errors.

The Circuit Court of Appeals erred:

1. In holding that it had jurisdiction to grant the appellants' second petition for rehearing and to set aside the judgment entered December 29, 1941, when said second petition for rehearing was filed more than three months after

the first petition for rehearing was denied, more than three months after the mandate had been issued, and more than three weeks after the expiration of the period fixed by statute for applying to the Supreme Court of the United States for a writ of certiorari.

2. In holding that it should grant the appellants' second petition for rehearing when the appellants had not shown any diligence in attempting to secure a review of the judgment entered December 29, 1941, in that they failed to exercise their right to petition the Supreme Court of the United States for a writ of certiorari to review said judgment.

3. In holding that the United States District Court must determine the validity under the Texas Law of an order of the Railroad Commission of Texas granting a permit to drill four oil wells by the exercise of the court's "independent judgment" on the question of whether the facts warranted the conclusion that the administrative order was proper and necessary to prevent the waste of public resources or the confiscation of private property.

4. In reversing the judgment of the District Court and in remanding the case for a new trial, since the District Court, upon original and sufficient evidence, decided all issues of fact and of state law in favor of the validity of the Railroad Commission's order.

Reasons for Granting the Writ.

1. The Circuit Court of Appeals in entertaining and granting a second petition for rehearing, which was filed after the time had expired for applying for a writ of certiorari, has decided an important question of Federal law which has not been, but should be, settled by this Court.

The Circuit Court of Appeals' first judgment was entered December 29, 1941; the appellants' first petition for rehearing was denied February 2, 1942; no motion for a stay was

filed and the mandate was issued February 17, 1942. Nothing further was done by appellants until their second petition for rehearing was filed on June 1, 1942. This second petition for rehearing set up no new questions of law or fact, but merely incorporated by reference the contentions made in the first petition for rehearing.

There is no provision contained in the rules of the Circuit Court of Appeals for a second petition for rehearing. Previously that court had stated that its rules did not contemplate the filing or consideration of second petitions for rehearing, particularly where such petitions presented no new questions not previously raised. See *City of Stuart* v. *Green*, 91 F. (2d) 603, 606.

After the first petition for rehearing was denied on February 2, 1942, the appellants had three months within which they could seek a review by this Court of the judgment of the Circuit Court of Appeals by a petition for a writ of certiorari. 28 U. S. Code, sec. 350. This time expired on May 2, 1942. From February 2, 1942, to June 1, 1942, the appellants had taken no action of any character whatever to stay or to review the judgment entered December 29, 1941. Upon the expiration of the time fixed by statute for review by this Court, the Circuit Court of Appeals' judgment became final and the Circuit Court of Appeals had no power thereafter to permit the filing of a second petition for rehearing.

The holding of the Circuit Court of Appeals that it retained jurisdiction to entertain and grant the appellants' second petition for rehearing is based on the purely technical conception of the term of court. The statute (Judicial Code, section 126; 28 U. S. C., section 223) and the rules of the Circuit Court of Appeals do not fix the length of the terms of court, but merely provide that a session of the court shall be held annually at the places named, including one session at the City of Fort Worth, Texas, beginning

on the first Monday in November. (Rule 3, United States Circuit Court of Appeals for the Fifth Circuit.) The Court apparently construes the statute and its rule to mean that each term lasts for one year, and the effect of the holding is that the Circuit Court of Appeals retains jurisdiction to entertain a petition for rehearing filed at any time during the term at which the judgment is rendered. Regardless of the fact that the time for applying for a writ of certiorari to this court has expired, no judgment can be considered final under the holding of the Circuit Court of Appeals until the expiration of the term of court. Since the terms of court apparently last for one year each, it may be as much as eleven months or longer after a judgment is rendered and a first petition for rehearing is overruled, before the term expires and the judgment can be considered final.

The evident intention of Congress in passing Section 350 of Title 28, United States Code, limiting the time within which a petition for certiorari may be filed for review of a judgment of the Circuit Court of Appeals to three months after the judgment was entered, was to fix a period of time within which the judgments of such courts might be considered final. The Supreme Court has no jurisdiction to review a decree of the Circuit Court of Appeals where the petition for certiorari is not filed until after the statutory period has expired. *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399. It is contrary to every consideration of policy in favor of reasonably prompt termination of litigation to permit a party to wait until this period has expired and then to reopen the case by filing a second petition for rehearing in the Circuit Court of Appeals. The period for filing a petition for rehearing should certainly be no longer than the period allowed by statute for review in this Court.

This question has not been settled by any decision of this Court. The only cases cited by the Circuit Court of Appeals

to sustain its holding do not relate to the question of the jurisdiction of that court to entertain a petition for rehearing after the time for review in this Court has expired. *Henderson* v. *Carbondale Coal & Coke Co.*, 140 U. S. 25; *Thomsen* v. *Cayser*, 243 U. S. 66. In the first case the petition for rehearing was promptly filed. In the second case, the opinion does not disclose when the petition was filed, and no point was raised or discussed about the time when it was filed.

In this connection, we respectfully direct the Court's attention to the analogy of the limitation placed on motions for new trial in the District Courts under the Rules of Civil Procedure. Under Rule 6(c) the time for doing an act or taking any proceeding is not limited by the expiration of the term of court. Under Rule 59(b) the time in which a motion for new trial can be served cannot extend beyond "the expiration of the time for appeal." It is submitted that the same principles apply to this case. The term of court has no logical connection with the time for filing a petition for rehearing, and in any event the court entering a judgment should not be permitted to entertain and grant a petition for rehearing and set aside its judgment after the time for review in the appellate court has expired.

2. In holding that upon a new trial the District Court should exercise its "independent judgment" in determining whether the Railroad Commission's order is valid under the state law, the Circuit Court of Appeals decided a federal question in a way probably in conflict with applicable decisions of this Court.

The District Judge who tried this case is the same District Judge who tried the first *Rowan & Nichols Case*, 310 U. S. 573, and was a member of the three-judge court which tried the second *Rowan & Nichols Case*, 311 U. S. 570. The

record in this case shows that the District Judge conscientiously followed this Court's opinions in the *Rowan & Nichols Cases*. After holding that the Railroad Commission's order "does not violate any of the rights of the plaintiff or the intervener under the 14th Amendment to the Constitution of the United States" (R. 90), the District Judge then held that "various matters of state law raised present no federal question and further present no matters of such merit as to warrant the issuance of an injunction" (R. 91). The District Judge construed the *Rowan & Nichols Cases* to hold that in "oil regulation cases" relief by injunction in the Federal Courts should not be granted "unless some condition is uncovered more extreme than those on which the courts have heretofore felt warranted in acting" (R. 91). Since such conditions were not found to exist in this case, the District Court denied relief.

The Circuit Court of Appeals in its first opinion approved the holding of the District Court that the evidence did not show any violation of the appellants' rights under the 14th Amendment (124 F. (2d) at p. 470). Although the District Court had expressly held that the various matters of state law presented were without merit (R. 91), the Circuit Court of Appeals misconstrued the District Court's action and held in effect that the District Court had refused to pass on the issues of state law (124 F. (2d) at p. 468). The Circuit Court of Appeals then approved the District Court's judgment in the following language (124 F. (2d) at p. 469):

> "In the absence of a clear showing of confiscation or lack of Due Process, such bodies should be left, at least by the Federal Courts, to deal with the situation, unless and until the court of last resort of the State has decided that an 'independent judgment' as to reasonableness should be exercised by the courts."

The Circuit Court of Appeals thus construed the opinions of this Court in the *Rowan & Nichols Cases* to mean that

the extent to which the Federal Court would inquire into the reasonableness of an administrative order of a state board depends upon the construction by the state court of the state statute providing for the review of the administrative board's order.

Thereafter, on May 13, 1942, the same Circuit Court of Appeals (but with Judges Hutcheson, Foster, and McCord composing the court) in another oil regulation case reached an entirely different conclusion as to the extent to which the Federal Court should pass on the reasonableness of an order of the Railroad Commission. *Selby Oil & Gas Co.* v. *Railroad Commission*, 128 F. (2d) 334. In an opinion by Judge Hutcheson, from which Judge McCord dissented, it was held (1) that in cases of diversity of citizenship, the state review statute (Article 6049c, Sec. 8, Vernon's Annotated Texas Civil Statutes) presented a distinct "statutory suit" (128 F. (2d) at p. 335) in addition to the "constitutional suit", (2) that the rule stated by this court in the *Rowan & Nichols Cases* applied only to cases not involving diversity of citizenship (128 F. (2d) at pp. 336-337), (3) that in cases of diversity of citizenship, the Federal Courts should follow the state decisions and that, since the state decisions hold that in the "statutory suit" the court must exercise its "independent judgment" in determining "whether the order rests upon a reasonable basis", the District Court erred in not determining this "statutory suit" by the "rules established by the Texas court" (128 F. (2d) at p. 337). Judge McCord dissented upon the ground that the decision was in conflict with the *Rowan & Nichols Case* and also the recent decision by the same Circuit Court of Appeals in the present case (128 F. (2d) at p. 337).

On June 1, 1942, the appellants, Sun Oil Company, et al., filed their second petition for rehearing in this case, the sole ground being that the decision in the *Selby Case* was in

conflict with the decision theretofore rendered in the present case (R. 421).

In granting the second petition for rehearing in this case, the Circuit Court of Appeals stated that it did so "to avoid injustice to anyone from a conflict in our decisions" (130 F. (2d) at p. 13). However, Judge Holmes, in the majority opinion, refused to concur in the conclusion reached by Judge Hutcheson that there were two suits—a "constitutional suit" and a "statutory suit"—and held that there was "only one suit" (130 F. (2d) at p. 16). Nevertheless, the court set aside its former judgment, because it purported to find in the decision of the Supreme Court of Texas in *Railroad Commission* v. *Shell Oil Co.*, 161 S. W. (2d) 1022 (rendered March 11, 1942), a declaration that in determining the reasonableness of the Railroad Commission's orders, the state courts must exercise their "independent judgment" (130 F. (2d) at p. 16). The Circuit Court of Appeals regarded this alleged clarification of the Texas law as being sufficient ground for setting aside its former judgment of affirmance and substituting a judgment reversing the judgment of the District Court and remanding the case for a new trial (R. 440).

Judge McCord specially concurred in a separate opinion, in which he doubted the right of the Circuit Court of Appeals to grant a rehearing "after the lapse of such great length of time," but agreed to the reversal in order that "the two cases (the *Selby Case* and this case) can on a new trial be determined in conformity with the decision of the Supreme Court of Texas, and the conflict which now exists in our two opinions may be obliterated" (R. 440). It is difficult to understand how the District Court could obliterate the conflicts in the opinions by the Circuit Court of Appeals in the present case and the *Selby Case*, when the Circuit Court of Appeals could not itself harmonize its own opinions.

In overruling the motion of Republic National Bank of Dallas to intervene, the majority of the court again stated that "the supervening decision of the Supreme Court of Texas, holding that the state courts might exercise such independent judgment, made it necessary for us to hold in our second opinion that the federal courts might decide such issues arising under the laws of the state. This was for the reason that prior to that time we deemed the particular point unsettled by Texas decisions, and were in doubt as to the state law on the subject" (130 F. (2d) at p. 19).

Judge McCord dissented from this opinion, his former doubts having become crystallized into the definite opinion "that the appellants' second petition for rehearing came too late and should not have been granted" (130 F. (2d) at p. 19).

The result of the three opinions in this case and the opinion in the *Selby Case* is to leave the applicable law in such confusion that it would be a practical impossibility for the District Judge to know how to try this case. The opinions of the Circuit Court of Appeals conflict with each other and all of them are in conflict with the law as laid down by this Court in the *Rowan & Nichols Cases.*

The effect of the opinion of the Circuit Court of Appeals in this case is that the Federal courts must go as far as the State courts would go in exercising an "independent judgment" in determining whether the order of the Railroad Commission is reasonable or not. Under the Texas decision relied upon by the Circuit Court of Appeals, *Railroad Commission* v. *Shell Oil Co.*, 161 S. W. (2d) 1022, it is held that "the doctrine that the administrative agency should take the testimony and make the findings of fact, and that the findings should be binding on the court, is foreign to the law of this state." (161 S. W. (2d), at p. 1028.) The Fed-

eral rule that the findings of a board, if supported by evidence, are conclusive, is repudiated in Texas. (161 S. W. (2d), at p. 1028.) Evidence must be taken anew in the court. (161 S. W. (2d), at p. 1029.) "Whether the agency heard sufficient evidence is not material. In fact, the evidence heard by the agency is not per se admissible upon the trial in the District Court." (161 S. W. (2d), at p. 1030.)

It is evident that the process which must be followed by the Texas courts under the decision of the Texas Supreme Court, in determining whether the order of the Railroad Commission is valid under the State law, is very different from the process to be followed by a Federal court in determining whether the order is valid under the 14th Amendment. Otherwise, there would have been no point in the Circuit Court of Appeals' action in reversing the judgment of the District Court, since the Circuit Court of Appeals in its first opinion had already held that the order was valid under the Federal Constitution. (124 F. (2d), at p. 470.) This part of its opinion has not been withdrawn by the Circuit Court of Appeals. (130 F. (2d), at p. 19.) The opinion of the Circuit Court of Appeals must mean, therefore, that it is incumbent upon the Federal court to determine the validity of the Railroad Commission's order under the State law by exercising an "independent judgment" upon the reasonableness of the order, disregarding any evidence that may have been heard by the Railroad Commission and any findings which it may have made upon such evidence, and determining for itself what constitutes "substantial evidence" to support the Commission's order.

It is submitted that this conclusion of the Circuit Court of Appeals is in direct conflict with the decisions by this Court in the *Rowan & Nichols cases*. In those cases, it was plainly stated that the Federal courts would go no further in testing the validity of an order of the Railroad Commis-

sion under the States statutes than they would in testing its validity under the Federal Constitution. This Court's language in the first *Rowan & Nichols case* is as follows (310 U. S., at p. 584):

> "What ought not to be done by the federal courts when the Due Process Clause is invoked ought not to be attempted by these courts under the guise of enforcing a state statute. Whether the respondent may still have a remedy in the state courts is for the Texas courts to determine, and it is not foreclosed by the denial, on the grounds we have indicated, of the extraordinary relief of an injunction in the Federal courts."

In the second *Rowan & Nichols case*, this Court, in passing on the constitutional issue, said (311 U. S., at p. 346):

> "Nor, on the basis of intrinsic skills and equipment, are the federal courts qualified to set their *independent judgment* on such matters against that of the chosen state authorities." (Our emphasis.)

This Court further held that the District Court erred in striking down the order on the ground that it did not prorate production on a "reasonable basis" saying (311 U. S., at p. 577):

> "In denying the petition for rehearing in the earlier cases we held that whatever rights the state statute may afford are to be pursued in the state courts, 311 U. S. 614."

In holding, as it has in this case, that the District Court must go beyond the inquiry which is necessary in order to test the validity of the Railroad Commission's order under the Due Process Clause and must follow the rule of the State courts and exercise its "independent judgment" on a trial *de novo* to determine the reasonableness of the order under

the State statute, the Circuit Court of Appeals has held contrary to the decisions of this Court just referred to.

3. In rendering conflicting decisions upon the same questions of law within a period of less than one month, the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The Circuit Court of Appeals (when Judges Hutcheson and Foster constituted the majority) held in *Selby Oil & Gas Co.* v. *Railroad Commission*, 128 F. (2d) 334, that in cases involving diversity of citizenship, the Texas statute (Article 6049c, sec. 8, Vernon's Annotated Texas Civil Statutes) permitting appeals from orders of the Railroad Commission to be brought in "a Court of competent jurisdiction in Travis County" conferred on the Federal courts jurisdiction of a distinct "statutory suit." (124 F. (2d), at pp. 335-336.) The Circuit Court of Appeals in the present case in its opinion handed down July 11, 1942 (when Judges Holmes and Dawkins composed the majority), expressly stated their refusal to assent to the holding in the *Selby* case. (130 F. (2d), at p. 16.) Both the majority opinion (130 F. (2d), at p. 13) and the special concurring opinion by Judge McCord (130 F. (2d), at p. 18) recognize a direct conflict with the holding in the Selby case. We, therefore, have the situation where the decisions of the same Circuit Court of Appeals are in direct conflict with each other and there is no hope of resolving this conflict, except by an authoritative decision of this Court, since any two members of the Circuit Court of Appeals may constitute a majority and the decision of a particular case will depend on which two of the members of the Court happen to constitute the majority in such case.

4. Upon the record in this case the order of the Railroad Commission of Texas is valid and should be sustained. Before the order under attack was entered in 1939 (R. 31), Burford had no wells on his lease. In the meantime, beginning in 1932 (R. 263) Sun Oil Company had drilled seven wells on its lease and Magnolia Petroleum Company had drilled five wells on its lease, both of which adjoin the Burford lease (R. 399). These Sun and Magnolia wells have produced large quantities of oil (R. 347), part of which has been drained from beneath Burford's lease (R. 243-245). In fact, at the time of the hearing before the Railroad Commission in 1938, the Magnolia Petroleum Company (with only five wells on its lease) had already produced the equivalent of 100% of the oil originally in place beneath its lease (R. 286). All of this oil had been replaced by drainage from other leases (R. 286, 347). Because of the erratic underground conditions in the Eastern edge of the East Texas Oil Field, where the Burford tract is located, one of the Burford wells is a dry hole and the other is a pumper which has not produced (R. 390, 391). The Railroad Commission was amply justified in concluding that in order for Burford to have a fair opportunity to recover his share of the oil, he should be permitted to drill the wells for which the permit under attack was granted. Certainly there is no reason why a Federal court of equity should intervene and, by cancelling the Railroad Commission's order and enjoining production from Burford's wells, deprive Burford of all means of producing oil from his own lease.

Conclusion

This case presents important questions pertaining to the jurisdiction and practice of Federal courts, which should be settled by this Court in order to avoid the utmost con-

fusion which has arisen by virtue of the conflicting decisions of the Circuit Court of Appeals. For the reasons stated, therefore, it is respectfully submitted that this petition for a writ of certiorari be granted.

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